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10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF NEVADA**
12

13 UNITED STATES OF AMERICA,
14 Plaintiff,
15 v.
16 GREGORY W. PHEASANT,
17 Defendant.

Case No. 3:21-CR-024-RCJ-CLB

**REPLY IN SUPPORT OF
MOTION TO SUPPRESS¹**

[Evidentiary Hearing Requested]

18
19 **I. INTRODUCTION**

20 Officers had no reason to suspect Mr. Pheasant knew his taillight was out. They claim
21 to have “tried” to tell him. But there is no sign they succeeded. And yet they detained him with
22 a baton to the spokes.

23 They needed evidence of knowledge to do that. The BLM’s taillight crime requires
24 specific intent. The government’s claim otherwise misunderstands the relevant authority,
25 *United States v. Henderson*, 243 F.3d 1168 (9th Cir. 2001). There is no “obviously unlawful”
26

¹ This reply is timely filed. ECF No. 62. The defense understands the briefing schedule set on this motion to remain undisturbed by the April 13, 2023, status conference and calendar call. *See* ECF No. 66.

1 carveout to that case. That phrase is part of *Henderson*'s reasoning about why all BLM crimes
2 require specific intent—not some exception to that specific-intent rule.

3 The government's various other arguments are similarly unavailing. This Court should
4 suppress evidence stemming from Mr. Pheasant's detention.

5 **II. ARGUMENT**

6 **A. An Evidentiary Hearing Is Necessary.**

7 As a preliminary point, an evidentiary hearing remains necessary on this motion.² The
8 government's response essentially concedes as much, expressly stating that resolution of the
9 motion turns on "the anticipated testimony at an evidentiary hearing." ECF No. 64 at 2; *see also*
10 *id.* at 17 n.7 (arguing that Mr. Pheasant was "clearly identified" "based on . . . anticipated
11 testimony of the BLM rangers"); *id.* at 20–21 (arguing that "the court could infer the defendant
12 had intentionally disconnected his taillight at some point" "[f]rom . . . the anticipated testimony
13 of the rangers").

14 We agree. Discovery shows that this detention was unlawful. *See generally* ECF No.
15 57. From the submitted materials, officer conduct was aggressive enough—including a baton
16 to the spokes of Mr. Pheasant's bike—to constitute an arrest. And doing all that was
17 unsupported by either reasonable suspicion or probable cause; officers had no reason to believe
18 Mr. Pheasant knew he was violating the taillight regulation. The government represents that
19 officer testimony might nonetheless alter that calculus. The government should be put to its
20 burden.

21 **B. Mr. Pheasant Was Unconstitutionally Detained.**

22 Evidentiary hearing or no, the already-proffered evidence reveals Mr. Pheasant's
23 detention was unlawful. This was a de facto arrest, and without probable cause in support. But
24

25 ² The parties and Court discussed the need for an evidentiary hearing at the Status
26 Conference on April 13, 2023. Mr. Pheasant maintains that evidence is required to resolve his
instant motion to suppress.

1 even if it were not, the same facts reveal that officers lacked even reasonable suspicion that Mr.
2 Pheasant knew his taillight was out. That renders the detention constitutionally deficient.

3 **1. Officers De Facto Arrested Mr. Pheasant.**

4 The government chiefly defends the detention by claiming it was a stop rather than an
5 arrest. ECF No. 11–17. The government is wrong. The officers’ tactics here were more intrusive
6 than an investigatory stop. And those tactics were not justified by the minor nature of the
7 purported violation at issue here—an inoperable taillight. This was an arrest.

8 **a. Officers’ Conduct Was Too Intrusive To Be A Stop.**

9 The intrusiveness of officer conduct here went beyond the scope of a stop. *See* ECF No.
10 57 at 7–9. The intrusion started at the same time the detention itself did: the detention started
11 with Ranger Yost thrusting his baton through the spokes of Mr. Pheasant’s motorcycle. *Id.* at
12 7–8. And it continued throughout the detention, too: more officers arrived, lights blaring, and
13 directed Mr. Pheasant’s movements. *Id.* at 8–9. All that goes far beyond a typical investigatory
14 stop. *Washington v. Lambert*, 98 F.3d 1181, 1185 (9th Cir. 1996).

15 The government’s primary response is to claim that officers detained Mr. Pheasant
16 “without any use of force.” ECF No. 64 at 14. That claim is incorrect. Ranger Yost used his
17 baton to disable Mr. Pheasant’s bike. Exhibit A at USAO 3, ECF No. 57-1; *see* ECF No. 57 at
18 7–8. That was a use of force. *Cf. United States v. Guzman-Padilla*, 573 F.3d 865, 879 (9th Cir.
19 2009) (concluding that the use of spike strips to disable vehicles was intrusive enough to require
20 a heightened evidentiary burden by the government during a border search). That Mr.
21 Pheasant’s vehicle bore the brunt of that force does not diminish that conclusion. *Id.*

22 Indeed, the use of the baton beforehand was also an intrusive—and forceful—tactic. *See*
23 ECF No. 57 at 7–8. To have thrust the baton through Mr. Pheasant’s spokes, Ranger Yost had
24 to have been, at the very least, holding it. And it would have been visible to Mr. Pheasant as it
25 was being moved towards (and then through) the wheel of his bike. Such a “display of a
26 weapon” goes beyond the intrusion of an ordinary stop. *Johnson v. Bay Area Rapid Transit*

1 *Dist.*, 724 F.3d 1159, 1177 (9th Cir. 2013). That is especially so here. The display and use of
 2 the baton here was designed to advance the detention. *See id.* And it happened right next to Mr.
 3 Pheasant himself. A reasonable person in his shoes would have been intimidated—and,
 4 particularly, feel unfree to leave.

5 The government nonetheless quibbles that the use of the baton might not have involved
 6 “wielding” or “brandishing.” ECF No. 64 at 22. But a plain reading of Ranger Yost’s own report
 7 suggests that he did both. Exhibit A at USAO 3, ECF No. 57-1. How could someone “quickly
 8 exit[]” a vehicle and “st[i]ck a baton through the spokes in the front tire” of a bike *without*
 9 wielding the baton? *Id.*³ Nothing in Ranger Yost’s report suggests the baton got there
 10 accidentally; quite the opposite, he “stuck” it there. *Id.* And a natural understanding of Ranger
 11 Yost’s mission with the baton also indicates that brandishing was involved too. As the
 12 government itself admits, the display and use of the baton was specifically designed to control
 13 Mr. Pheasant’s conduct. ECF No. 64 at 22 (“[T]he preeminent thought in Ranger Yost’s mind
 14 was to stop the defendant’s ability to flee on his motorcycle Ranger Yost used his baton
 15 as a disabling tool to keep the defendant from fleeing on his motorcycle.”). That is classic
 16 brandishing.⁴

17 Ultimately, though, whether the conduct fits a technical legal definition of either term
 18 is beside the point. What Ranger Yost did with the baton is undisputed: he thrust it between the
 19 spokes of Mr. Pheasant’s bike. *See* ECF No. 64 at 8 (“[Ranger Yost] quickly exited his UTV
 20 and stuck his baton through the spokes”). And using a weapon at all is an intrusive tactic
 21 ordinarily beyond the scope of a stop. *Johnson*, 724 F.3d at 1177 (“[W]e begin from the
 22

23 ³ *See, e.g., Hughes v. Kisela*, 8622 F.3d 775, 790 n.3 (9th Cir. 2016) (Berzon, J.,
 24 concurring in the denial of reh’g en banc) (collecting definitions for “wield”; noting the term
 implies the use of an object “with skill and effect” or “actuating, plying, or employing” the
 object for a particular purpose).

25 ⁴ *See, e.g., 18 U.S.C. § 924(c)(4)* (defining “brandish” for firearms-related conduct as
 26 “display[ing] all or part of the firearm, or otherwise mak[ing] the presence of the firearm known
 to another person, in order to intimidate that person”).

1 presumption that no weapons are used at all in conducting an investigatory stop.”). Especially
2 when coupled with the various intrusive tactics that followed—the officers surrounding Mr.
3 Pheasant, flashing their police lights at him, directing his movements, and threatening to
4 handcuff him—the detention was an arrest.

5 **b. Those Tactics Were Not Justified.**

6 Nothing justified those tactics. Mr. Pheasant was not violent, not armed, and not
7 disruptive. *Washington*, 98 F.3d at 1189. So officers had none of the recognized reasons to take
8 the steps they took here. *Id.*

9 For its part, the government claims just one possible justification for the intrusive officer
10 conduct: that Mr. Pheasant had earlier “attempt[ed] to flee from the rangers.” ECF No. 64 at
11 15. That alleged refusal-to-stop conduct, the government asserts, was enough to warrant a baton
12 to the spokes. Indeed, the government says, Ranger Yost “could have used more force” and
13 could have “physically restrain[ed]” Mr. Pheasant himself. *Id.*

14 The biggest problem for that position is that the government cites no evidence that Mr.
15 Pheasant had previously been asked to stop. *See* ECF No. 64 at 15. There does not appear to be
16 any. Most significantly, there is no bodycam footage of Mr. Pheasant being asked to stop prior
17 to having the baton thrust into his bike. *Cf.* Exhibit D, USAO 18, ECF No. 57-4 (not asking Mr.
18 Pheasant to stop). What other evidence there is suggests essentially everything the officers said
19 while driving was inaudible to Mr. Pheasant. *See* Exhibit A at USAO 3, ECF No. 57-1 (noting
20 that Ranger Yost “tried” to say some things). Off-road vehicles are loud. *Listen to* Exhibit D,
21 USAO 18, ECF No. 57-4. Mr. Pheasant was also, quite sensibly, wearing a helmet—further
22 limiting any ability to hear any statements. *See id.* Far from prove Mr. Pheasant had previously
23 “attempt[ed] to flee,” then, the evidence tends to show that any officer communications merged
24 into the ambient noises of Moon Rocks festivities.

25 Even if Mr. Pheasant had refused earlier commands, however, that would still not be
26 enough to justify the use of arrest-like tactics. *Sialoi v. City of San Diego*, 823 F.3d 1223, 1234

1 (9th Cir. 2016) (“An individual’s temporary refusal to comply with an officer’s demands is not
2 in itself a valid basis for an arrest.”). An officer cannot take a weapon to a vehicle just because
3 it took a couple of minutes for the driver to pull over. *Id.* Nor, therefore, would concluding Mr.
4 Pheasant was arrested here “be the same” as holding “that every individual stopped for
5 speeding . . . had similarly been arrested.” ECF No. 64 at 16. In an ordinary traffic stop, officers
6 do not use their weapons to disable a vehicle’s wheels. That they did so here made this detention
7 a de facto arrest from the get-go.

8 In short, officers took a range of actions intended to physically limit Mr. Pheasant’s
9 movement. Those tactics—starting at the detention’s inception with a baton to the spokes of his
10 bike—were more intrusive than warranted by the circumstances. This was a de facto arrest.

11 **2. Officers Lacked A Sufficient Basis To Detain Mr. Pheasant.**

12 Officers could not detain Mr. Pheasant like that. Nothing gave them reasonable
13 suspicion, never mind probable cause, to believe that Mr. Pheasant knew that his taillight was
14 out, the sole basis for the detention. They therefore could not stop him, let alone de facto arrest
15 him, for that alleged taillight violation.

16 As an initial point on this front, the government does not dispute that the only possible
17 reason for the detention was the alleged taillight problem. For good reason; Ranger Yost had
18 no other reason to suspect misconduct. *See* ECF No. 64 at 12 n.5 (conceding that Ranger Yost
19 “was not aware” of Mr. Pheasant’s alleged conduct towards Ranger Sarcinella); *see also* ECF
20 No. 57 at 12–15 (addressing the same). This Court’s analysis here can therefore start and end
21 with the alleged taillight issue.

22 On that taillight issue, the government insists that: (1) the taillight issue is a general
23 intent offense for which evidence of knowledge is unnecessary; and, alternatively, (2) officers
24 had a sufficient basis to believe Mr. Pheasant knew his taillight was deficient. Both arguments
25 are wrong.

1 **a. The Taillight Offense Requires Evidence Of Specific**
2 **Intent.**

3 BLM-created crimes require specific intent—not general intent. The Ninth Circuit held
4 as much in *Henderson*, 243 F.3d at 1173. That case is controlling. The alleged taillight violation
5 here therefore requires that Mr. Pheasant “was aware that the conduct in question was
6 unlawful.” *Id.* at 1171. With no indication of such knowledge, officers could not detain Mr.
7 Pheasant.

8 *Henderson* notwithstanding, the government claims that the taillight offense is actually
9 a general-intent crime. ECF No. 64 at 19–20. There is, for starters, reason to reject the
10 government’s general-intent argument here without even reaching its merits: the government
11 has all but conceded the opposite in other filings. In response to Mr. Pheasant’s motion-to-
12 dismiss arguments that the indictment fails to adequately plead specific-intent elements for (as
13 relevant here) the taillight offense, the government represents that it will file a superseding
14 indictment to allege requisite *mens rea* elements. ECF No. 63 at 13. That should be treated for
15 what it is: a concession that the taillight offense (and, for that matter, the creation-of-risk one)
16 requires evidence of specific intent.

17 Even if the Court were to overlook the government’s apparent concession on specific
18 intent, however, the government’s general-intent argument here is foreclosed by *Henderson*.
19 Per that case, the statute that lets BLM write crimes, 43 U.S.C. § 1733(a), “clear[ly]” requires
20 that the government “show that violations of BLM regulations were committed ‘knowingly *and*
21 willfully.’” 243 F.3d at 1171 (emphasis in original). That knowingly-and-willfully language
22 makes the statute itself “a specific-intent offense.” *Id.* at 1170. And so all of the regulations
23 promulgated under that section (like the taillight offense at issue here) are specific-intent
24 offenses too. *Id.* at 1173. In short, the plain language makes clear that “violations of BLM
25 regulations enforced under 43 U.S.C. § 1733(a) are specific-intent offenses.” *Id.*
26

1 That much, the *Henderson* court said, was confirmed by two additional interpretive
2 principles about specific intent. *Id.* at 1172. *Henderson* identified that “in the criminal context,”
3 Congress is presumed to require “proof of knowledge of unlawfulness” (1) “when the criminal
4 conduct is contained in a regulation instead of in a statute” and (2) “when the conduct punished
5 is not obviously unlawful.” *Id.* And both things were true of § 1733(a); the statute both did its
6 crime-writing via agency and let the agency regulate some potentially innocent conduct (like
7 digging for buried treasure) in the process. *Id.* at 1173. Those features, like the text itself,
8 confirmed that the statute and all of its regulations required specific intent. *Id.*

9 “[I]n order to sustain a conviction” in BLM-regulatory-charge case (like this one), then,
10 the government needs to “establish that Defendant was aware that the conduct in question was
11 unlawful.” *Id.* at 1171. No ifs, ands, or buts. All BLM-created regulatory offenses require
12 specific intent.

13 Per the government, however, *Henderson*’s conclusion does not extend to any
14 regulatory offenses that are “obviously unlawful.” ECF No. 64 at 20. And, according to the
15 government, it is “obviously unlawful” to drive without a functioning taillight. *Id.*

16 Both moves in that reasoning are wrong. First: there is no obviously-unlawful exception
17 to *Henderson*. That language is an analytical step, not a carveout. Congress let the BLM
18 criminalize some “apparently innocent” conduct (like digging for buried treasure) under
19 § 1733(a). *Henderson*, 243 F.3d at 1172 (quotation omitted). And that, *Henderson* says,
20 indicates that Congress “wanted” every regulation issued under the statute “to require a
21 voluntary, intentional violation of a known legal duty.” *Id.* at 1173 (quotation omitted). There
22 are other indications of that purpose, too. The specific-intent requirement is also confirmed by
23 (naturally) the plain language of the statute itself (“knowingly and willfully”), as well as the
24 fact that “the conduct penalized . . . is listed not in the statute, but in administrative regulations.”
25 *Id.* Given all three considerations, *Henderson* concluded that the authorizing statute itself—and
26 therefore all BLM-created criminal regulations—requires specific-intent. *Id.* That means that

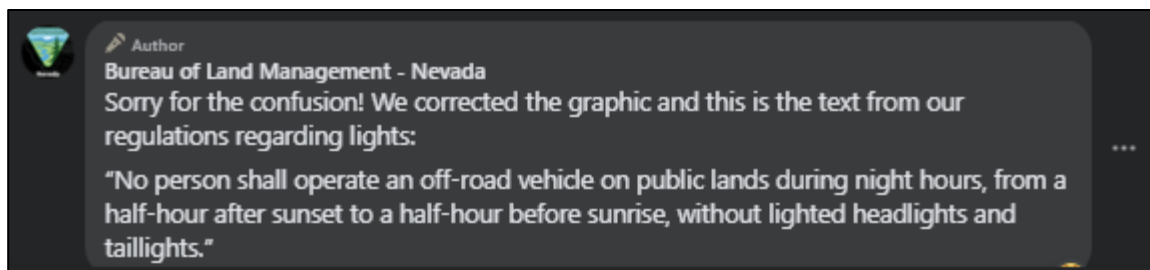
1 the fact that the statute lets the BLM issue “some regulations” that “bar conduct that is not
2 obviously illegal” is simply one reason why the top-level statute requires specific intent for all
3 the regulations it authorizes. *Id.* There is not a general-intent carveout for “obviously unlawful”
4 offenses.

5 Second: even if there were an obviously-unlawful exception to *Henderson* (there is not),
6 it is not “obviously unlawful” to drive without a functioning taillight. The regulation itself
7 reveals as much. By its terms, you can drive without a functioning taillight any time during the
8 day. *See* 43 C.F.R. § 8341.1(f)(5) (applying only “[d]uring night hours”). And you can even
9 drive without a functioning taillight during much of the night, too. *See id.* (permitting as much
10 for a “half-hour after sunset” and a “half-hour before sunrise”). You can therefore engage in
11 the conduct innocently. *See United States v. Lizarraga-Lizarraga*, 541 F.2d 826, 828 (9th Cir.
12 1976) (identifying that specific intent is required for agency-made import offenses in part
13 because “items might be exported or imported innocently”). This offense would therefore keep
14 its specific-intent character even if *Henderson* contained some obviously-unlawful exception.

15 In fact, even the BLM seems confused about the legality of driving without a taillight.
16 In a BLM bulletin for Moon Rocks posted on Facebook in advance of Memorial Day 2021 (the
17 weekend Mr. Pheasant was detained), the agency specifically blacked out the taillight
18 prohibition (suggesting it was not in effect):
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Reply Exhibit A. In a follow-on post, the BLM recognized that the original bulletin had caused “confusion” “regarding lights.” Given that confusion, the BLM felt obliged to issue a “corrected” version (without the blackout):



1 *Id.* If an errant highlighter is all it takes to cause “confusion” about conduct’s illegality, the
2 conduct is not “obviously illegal.” *Id.*

3 In short, the government has all but conceded that the taillight offense is a specific-
4 intent one. For good reason: *Henderson* resolves the question. The government’s attempt in
5 suppression-briefing to twist an obviously-unlawful exception out of that case misconstrues the
6 Ninth Circuit’s reasoning and, in any event, would not apply to the taillight issue here even if
7 it were somehow right. This is a specific-intent offense.

8 And because the alleged taillight violation is a specific-intent offense, officers needed
9 “particularized probable cause” to believe that Mr. Pheasant had “actual knowledge” of his
10 taillights “non-conformity” to detain him as they did. *Easyriders Freedom F.I.G.H.T. v.*
11 *Hannigan*, 92 F.3d 1486, 1499 (9th Cir. 1996) (concluding the same about a helmet regulation).
12 Put simply: the officers had to have reason to think Mr. Pheasant himself knew his taillight was
13 deficient.

14 **b. There Was No Sign Mr. Pheasant Knew His Taillight**
15 **Was Deficient Prior To Detaining Him.**

16 They lacked that. All of Mr. Pheasant’s conduct before the detention (and, for that
17 matter, after it) fit someone who had no idea his taillight was out. *See* ECF No. 57 at 10–12
18 (identifying as much). So officers lacked reasonable suspicion to stop, never mind probable
19 cause to arrest, Mr. Pheasant for the taillight violation.

20 The government nonetheless insists that officers had reason to believe Mr. Pheasant
21 knew of the deficiency because (1) Ranger Yost had earlier “tried” to tell him his taillight was
22 out; and (2) after he was detained, Mr. Pheasant made “various statements . . . implying that he
23 [wa]s going to reconnect his taillight, and he d[id] just that.” ECF No. 64 at 20–21. Neither is
24 enough.

25 As for the purported pre-detention attempt to tell Mr. Pheasant about the issue, there is
26 no evidence that Mr. Pheasant heard Ranger Yost say anything—let alone comment on the

1 taillight deficiency. Ranger Yost’s report says only that he “tried” to tell Mr. Pheasant about it
2 earlier in the night. Exhibit A at USAO 3, ECF No. 57-1. And bodycam footage of that attempt
3 indicates that it failed. Ranger Yost only referenced the taillight after Mr. Pheasant had ridden
4 off, as well as after Ranger Yost himself had turned around and walked multiple steps back
5 towards his own vehicle. Exhibit D, USAO 18 at 00:16, ECF No. 57-4. There is therefore no
6 sign Mr. Pheasant (by then some distance away) had heard the comment. Officers could not
7 derive probable cause or reasonable suspicion for his detention from this interaction.

8 Nor can the government bootstrap justification for the detention from Mr. Pheasant’s
9 post-detention conduct. Officer conduct must be “justified at its inception”—not with post-hoc
10 revelations. *United States v. I.E.V.*, 705 F.3d 430, 433 (9th Cir. 2012) (quoting *Terry v. Ohio*,
11 392 U.S. 1, 30 (1968)) (identifying as much for stops); *Scott v. Cnty. of San Bernardino*, 903
12 F.3d 943, 949 (9th Cir. 2018) (same for arrests). Whatever Mr. Pheasant did after the start of
13 the detention is therefore irrelevant.

14 But even if that conduct were properly considered, Mr. Pheasant’s post-detention
15 statements and behavior also reflected someone who had just found out his taillight was out.
16 For apparently the first time that night, he heard that his light was not working. So he fixed it.
17 *E.g.*, Exhibit E, USAO 19 at 2:04–06 (demonstrating light working), 5:33–46 (same), ECF No.
18 57-5. There is nothing suspicious, let alone potentially criminal, about that.

19 Thus, officers lacked any basis—no reasonable suspicion, no probable cause—to detain
20 Mr. Pheasant for the taillight violation. That is the only basis the government offers for his
21 detention. The detention was therefore unconstitutional.

22 **C. Evidence Stemming From That Unconstitutional Detention Should Be**
23 **Suppressed.**

24 Finally, the exclusionary rule applies to all post-detention evidence here. The
25 government makes a passing claim that the exclusionary rule would “serve[] no purpose in this
26 case.” ECF No. 64 at 21. But the government’s argument on the subject is just another claim

1 that the detention was constitutional. *Id.* (arguing as much because “there was no unlawful
2 conduct”). There is no serious dispute that, should the Court conclude the detention was
3 unlawful, suppression of all evidence collected as a result would be warranted. *Murray v.*
4 *United States*, 487 U.S. 533, 536 (1988). And as discussed above, the detention was unlawful.
5 So suppression is a proper remedy. *Id.*

6 Such evidence includes the bodycam footage from the detention, as well any other
7 evidence of Mr. Pheasant’s conduct during that time (including any photographs, reports,
8 officer testimony, or portions of them on the subject). The government apparently intends to
9 rely on such materials at trial. But since they resulted from an unlawful detention, they should
10 be suppressed. *Id.*

11 **III. CONCLUSION**

12 Mr. Pheasant respectfully requests the Court hold an evidentiary hearing and suppress
13 all evidence collected in violation of his Fourth Amendment rights.

14 DATED this April 14, 2023.

15 RENE L. VALLADARES
16 Federal Public Defender

17 By: /s/ Sean A. McClelland

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CERTIFICATE OF ELECTRONIC SERVICE

I certify that on April 14, 2023, I electronically filed the foregoing with the United States District Court for the District of Nevada by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. The following non-CM/ECF participants will be served by U.S. Mail: Gregory W. Pheasant.

/s/Katrina Burden

Katrina Burden

Federal Public Defender Employee